6-10-1985

Petitioner's Hearing Memorandum

United States District Court Western District of Washington

JUDGE VOORHEES

CC TO JUDGE _____

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	NO. C83-122V PETITIONER'S HEARING MEMORANDUM

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

115

TABLE OF CONTENTS

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

TABLE OF AUTHORITIES

Cases

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

TABLE OF AUTHORITIES, continued

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

TABLE OF AUTHORITIES, continued

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	NO. C83-122V PETITIONER'S HEARING MEMORANDUM

INTRODUCTION

Petitioner seeks issuance of a writ of error coram nobis to vacate his criminal convictions of October 20, 1942 of two violations of Public Law No. 503: failure to observe a curfew as required by Public Proclamation No. 3 and refusal to be evacuated as required by Civilian Exclusion Order No. 57. The relief requested by Petitioner is based on numerous acts of misconduct by different agencies of the Government during and after Petitioner's trial.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

FACTS

I. OFFICIALS OF THE WAR DEPARTMENT ALTERED AND DESTROYED EVIDENCE AND WITHHELD EVIDENCE FROM THE JUSTICE DEPARTMENT, SUPREME COURT, AND PETITIONER.

Edward J. Ennis, Director of the Alien Enemy Control Unit of the Justice Department, was responsible for supervising preparation of the Government's briefs in Hirabayashi v. United States, 320 U.S. 81 (1943), which was set for argument before the Supreme Court on May 10, 1943. Ennis formally requested the War Department, the Government agency responsible for the evacuation program, to supply "any published material" in the Department's possession that would help in preparation for trial.

Pursuant to his outstanding request, Ennis was told in April 1943 that a report entitled "Final Report, Japanese Evacuation from the West Coast, 1942," prepared by General DeWitt, was being rushed off the press. DeWitt sent six printed and bound copies of this initial Final Report to the War Department. These copies were accompanied by cover letter dated April 15, 1943.

In April 1943, Assistant Secretary of War John J. McCloy received printed and bound copies of the Final Report, which contained the military's justification for the evacuation. Upon review of this report, McCloy objected to the Government's admission that it was impossible to determine the loyal from disloyal Japanese and that therefore the time needed to determine loyalty of the Japanese Americans had not been a factor in its decision to recommend evacuation. Second, McCloy objected to the racist implications of the assertion that it was impossible to

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

establish the identity of loyal individuals. McCloy understood that these statements could potentially expose the Government's violation of Petitioner's right to due process; destroy the Government's credibility before the Supreme Court; and risk the outcome of the Hirabayashi case.

As a result, McCloy directed that the Final Report be altered and withheld from the Justice Department. All circulated copies of the Report were recalled, galley proofs were destroyed, and transmittal letters were redated. Without access to the Final Report and without being advised as to the military's true position, the Justice Department asserted in its Hirabayashi brief to the Supreme Court that the evacuation of the Japanese population on the West Coast was necessary because of the lack of sufficient time in which to make loyalty determinations.

Although circulated within the War Department, War Department officials withheld general release of the Final Report until January 1944. The purge of the War Department records erased any hint of the existence of the original Final Report. The facts surrounding the suppression of this evidence came to light after the recent discovery of a copy of the original Final Report and of the documents relating to its alteration and destruction.

II. OFFICIALS OF THE WAR DEPARTMENT AND THE JUSTICE DEPARTMENT SUPPRESSED INTELLIGENCE REPORTS WHICH REFUTED ALLEGED DISLOYALTY AND ESPIONAGE ACTS OF JAPANESE AMERICANS.

Since early 1942, officials of the War Department and the Justice Department routinely received reports from the Office of

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Naval Intelligence (ONI), the Military Intelligence Division of DeWitt's Command (MID), the Federal Bureau of Investigation (FBI), and the Federal Communications Commission (FCC). These reports conclusively refuted all allegations of disloyalty and espionage and discredited the "military necessity" claim offered in support of the mass evacuation and incarceration of Japanese Americans. However, none of this exculpatory evidence was disclosed to the Petitioner or to the courts that considered Petitioner's case.

A. Suppression of the ONI Report to the Chief of Naval Operations on the Loyalty of Japanese Americans and the Munson Reports.

By 1940 the ONI, pursuant to the "Delimitation Agreement," was assigned primary responsibility for investigation of the Japanese American population on the West Coast. Among the most significant of the intelligence reports suppressed by Government officials in Petitioner's case was the ONI Report entitled "Report on the Japanese Question" (the "ONI Report"), submitted on January 26, 1942, and prepared by Lt. Commander Kenneth D. Ringle at the direction of the Chief of Naval Operations.

Lt. Commander Ringle, recognized expert on Japanese Americans and then officer in charge of naval intelligence matters in the Los Angeles area, explicitly recommended against mass evacuation or other restrictive measures directed against Japanese Americans as a group. The report made it clear that allegedly disloyal Japanese Americans, estimated at less than 3%, could easily be identified and segregated. It concluded that the

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Japanese Americans were "Americanized," and that the vast majority were loyal to the United States and presented little danger to military security.

In accordance with the "Delimitation Agreement" between federal intelligence agencies, the ONI Report was available to the FBI and to General DeWitt through the MID. The ONI Report came to the personal attention of both Attorney General Biddle and Assistant Secretary of War McCloy before General DeWitt issued the curfew and exclusion orders applicable to Petitioner. The substance and conclusions of the ONI Report came to the attention of Justice Department officials during preparation of the Government's brief to the Supreme Court in Hirabayashi.

In an April 1943 memorandum from Ennis to Solicitor General Fahy, Ennis acknowledged the ONI as the agency primarily responsible for the intelligence work regarding the Japanese Americans; recognized that a report written by Ringle for the War Relocation Authority (WRA) was the most reasonable and objective discussion of the security problem presented by the Japanese minority; urged that care be taken in arguing any position or facts more hostile to the Japanese than the position set forth in the report; and urged careful consideration by the Justice Department of the duty to advise the Court of the existence of Ringle's WRA report and the fact that it represented the view of the ONI.

Furthermore, just prior to the outbreak of the war, Curtis B. Munson, a well-to-do Chicago businessman, was assigned

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

to informally collect intelligence for President Roosevelt on the ethnic Japanese on the West Coast and in Hawaii. He reported to John F. Carter, an unofficial advisor to the President, who in turn passed on these reports to Roosevelt. Munson wrote three reports from November 1941 through December of 1942 and concluded both before and after Pearl Harbor that there was no Japanese "problem." He reported that the degree of loyalty within the Japanese ethnic population was small and not demonstrably greater than other racial groups and concluded that mass evacuation was unnecessary and not militarily justified.

Although Attorney General Biddle, Assistant Secretary of War McCloy, and Solicitor General Fahy each personally knew that the ONI Report directly controverted the statements made to the Court on the loyalty issue, the Government failed to disclose the ONI Report or Munson's reports to the Petitioner. Moreover, Government's brief to the Supreme Court in Hirabayashi failed to mention these available intelligence reports.

B. Suppression of Reports of the MID, the FBI, and the FCC that Refuted the Espionage Allegations in the Final Report.

The reports of the MID, the FBI, and FCC show the falsity of the espionage allegations made in the Final Report. Well before the outbreak of the war between the United States and Japan, the FBI and FCC were actively investigating espionage activities on the West Coast and elsewhere in the country. The MID, FBI, and FCC found no evidence of Japanese American involvement in espionage or sabotage, yet both versions of the Final Report

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

included as a military justification the discredited allegations of shore-to-ship signalling and radio transmissions.

III. THE GOVERNMENT FAILED TO ADVISE THE SUPREME COURT OF THE FALSITY OF THE ALLEGATIONS IN THE FINAL REPORT.

Evidence contained in the reports submitted by responsible intelligence agencies provided officials of the War Department and the Justice Department with personal knowledge of exculpatory evidence relevant to issues central to Petitioner's case. This evidence discredited the "military necessity" claim offered by the Government in support of the curfew restrictions and the evacuation program.

The Government had a continuing duty to bring this evidence to the Court's attention. After Hirabayashi, Ennis attempted to advise the Court of the falsity of the Final Report in the Government's brief to the Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944). However, at the insistence of the War Department, the Justice Department disregarded this effort and prevented the Court from learning of the exculpatory intelligence reports and the falsity of the Final Report.

IV. THE GOVERNMENT'S ABUSE OF THE DOCTRINE OF JUDICIAL NOTICE AND THE MANIPULATION OF THE AMICUS BRIEFS CONSTITUTED A FRAUD UPON THE COURTS.

The Government employed the doctrine of judicial notice to present to the Court the discredited allegation that "racial characteristics" of Japanese Americans predisposed them to disloyalty and to the commission of espionage and sabotage. The Government made these allegations despite knowledge of contrary

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

evidence in its possession. This abuse of the doctrine of judicial notice by the Government resulted in a fraud upon the Courts.

Though War Department officials withheld copies of the Final Report from the Justice Department until January 1944, a significant portion of the contents of the original Final Report was effectively presented to the Supreme Court in the Hirabayashi case through an amicus brief submitted by the Western States of Washington, Oregon, and California.

By concealing the Final Report from the Justice Department, yet assuring its introduction through friendly amici, the War Department manipulated the judicial process and placed erroneous and intemperate briefs before the Court. The false picture led the Court to conclude that the military orders at issue were justified by military necessity.

DISCUSSION

I. BECAUSE THE GOVERNMENT DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT, HE IS ENTITLED TO RELIEF BY WRIT OF ERROR CORAM NOBIS.

The writ of error coram nobis is available by statute, 28 USC § 1651(a), to challenge a federal criminal conviction obtained by the Government through constitutional or fundamental errors that render a proceeding irregular and invalid. United States v. Morgan, 346 U.S. 502 (1954).

Coram nobis relief is warranted where government abuses "offend elementary standards of justice," cause "serious prejudice to the accused," or, even absent such prejudice,

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

"undermine public confidence in the administration of justice." United States v. Taylor, 648 F.2d 565, 571 (9th Cir.), cert den. 454 U.S. 866 (1981). As stated in Taylor, the leading Ninth Circuit case,

> ... prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, especially when the taint in the proceedings seriously prejudices the accused.... When a conviction is secured by methods that offend elementary standards of justice, the defendant may invoke the Fourteenth Amendment guarantees of a fundamentally fair trial.... Moreover, this principle is not strictly limited to those situations in which the defendant has suffered arguable prejudice, the principle is designed to maintain also public confidence in the administration of justice.

(Emphasis added.) Id. at 571.

Because the Government's abuses in this case could reasonably be deemed to have affected the outcome, Petitioner is entitled to coram nobis relief vacating his conviction. It is then for the Government to decide if it wants to seek a new trial to determine guilt or innocence in fair proceedings. Although the Ninth Circuit in Taylor did not state the extent of prosecutorial malfeasance necessary to warrant relief, it is clear from a close reading of the case that it is not necessary for Petitioner to show that the result would have been different. It is only necessary to show that the malfeasance could have affected the result and thereby rendered the proceedings unfair and offended elementary standards of justice. Id. at 571.

In addition, coram nobis relief is warranted where Government abuses seriously prejudice the accused or where, even absent such prejudice, the abuses undermine the public confidence

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

in the administration of justice or otherwise interfere with the judicial process vital to a democracy. The Taylor decision clearly states that guilt or innocence is not the fundamental consideration in due process arguments. The court cites Justice Frankfurter:

> This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt of innocence but the mode by which guilt is ascertained. Irvine v. California, 347 U.S. at 148, 74 S. Ct. at 391 (Frankfurter, J. dissenting.)

Id. at 571, n.20.

The Taylor court ordered the trial court to hold an evidentiary hearing to determine if the abuses of the prosecution were serious enough to warrant a new trial. Taylor, 648 F.2d at 574. It was not the purpose of the evidentiary hearing to determine guilt or innocence. If the abuses were proven, then a new trial would be ordered.

An examination of the facts in Taylor confirms that the Ninth Circuit was not focusing on a standard requiring evidence so extensive that it compelled a different result. The petitioner in Taylor complained that the government falsely asserted that it had subpoenaed a particular document and, since the document was not produced, was allowed to place before the court other evidence of the contents of the document. Petitioner Taylor asserted that no subpoena was ever issued. The evidence submitted in place of the document was damaging to petitioner's case. The court ruled that "Taylor's claim of government fraud

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

would, if proven, meet the various tests for relief in the nature of coram nobis." Taylor, 648 F.2d at 571. Thus, it was not necessary for petitioner Taylor to prove that he would have been acquitted but for the government's misconduct. Instead, it was enough that the misconduct involved important evidence that rendered the proceedings unfair.

If, as the Ninth Circuit states, the abuses in Taylor were serious enough to warrant relief, the abuses in the case at bar are vastly more serious and pervasive in the proceedings involving Petitioner. Moreover, the particular abuses affect matters specifically relied upon by the Court in reaching its decision.

II. THE PROSECUTION'S USE OF FALSE EVIDENCE AND THE SUPPRESSION OF MATERIALLY FAVORABLE EVIDENCE IN THE PETITIONER'S TRIAL AND APPEALS CONSTITUTED A DENIAL OF DUE PROCESS AND REQUIRES THAT PETITIONER'S CONVICTIONS BE VACATED.

A. Standards of Materiality.

In order to present the strongest possible case to the courts, the Government placed before the trial court and appellate courts a "tailored" factual record to support its claim that "military necessity" justified the imposition of the military curfew and exclusion orders. The record before the courts contained false and inaccurate evidence to support this justification. In addition, the Government suppressed evidence which refuted its claim of "military necessity." Had the courts been provided with accurate and credible facts, the military orders and the federal statute making it a criminal offense to

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

violate such orders might not have been upheld against Petitioner's constitutional attacks.

The Ninth Circuit, in Taylor, stated that coram nobis relief is warranted when Government abuses (1) offend elementary standards of justice, (2) cause serious prejudice to the accused, or (3) even absent such prejudice, undermine public confidence in the administration of justice. Based on that general standard, the court should grant Petitioner's request for coram nobis relief. By examining decisions dealing with the suppression of evidence and the use of false evidence, the court should conclude that the Government misconduct seriously prejudiced Petitioner.[1]

The Supreme Court in United States v. Agurs, 427 U.S. 97 (1976) identified three situations involving suppression of evidence or use of false evidence and defined for each situation the circumstances in which a conviction may be vacated. Two situations are relevant here:

(1) In cases typified by Mooney v. Holohan, 294 U.S. 103 (1935), the prosecution introduces perjured testimony or false evidence which it knows or should know is false. In a series of cases after Mooney, "the Court has consistently held that a

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[1] Petitioner believes that the standard of materiality described in the text of this memorandum provides the court with ample guidance to find that coram nobis relief should be granted without an examination of actual prejudice. If, however, the court focuses solely on the prejudice suffered by Petitioner, the court must determine the materiality of the suppressed evidence

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RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Emphasis added.) Agurs, 427 U.S. at 103. Presumably this same standard applies where the prosecution knowingly uses false evidence. Therefore, if there is any reasonable likelihood that perjured testimony or other false evidence could have affected the judgment of the judge or the jury, the conviction must be set aside.

(2) The second group of cases is typified by Agurs which sets a standard of materiality for cases of suppression where no request for disclosure is made. The prosecutor violates his constitutional duty if "his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." Agurs, 427 U.S. at 108.

The standard for determining sufficient significance in cases where, as here, the evidence was available to the prosecution is not as high as cases in which new evidence is discovered from a neutral source. In "neutral source" cases it must be shown that newly discovered evidence would probably have resulted in acquittal. Fed. Rule Crim. Proc. 33. Agurs, 427

(footnote continued)

by reexamining Public Law 503 and its underlying military orders in light of both the suppressed evidence and the constitutional standards relating to racial characteristics.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

U.S. at 111, n.19. On the other hand, the standard is higher than the not harmless-error standard. Agurs, 427 U.S., at 112. The Agurs standard requires that the suppressed evidence create some reasonable doubt, but the standard does not require the suppressed evidence to be so material that disclosure of the suppressed evidence would have resulted in the acquittal. This is clear from the fact that the Court states that the standard is not so high as to require "probability" of acquittal. Id. at 111. In some circumstances the new evidence in itself might be "of relatively minor importance" and yet require a new trial. Id. at 113.[2]

B. The Government Suppressed Material Evidence Contradicting the "Military Necessity" Justification Underlying The Curfew and Exclusion Orders

In Petitioner's case, Petitioner did not deny that he knowingly violated Public Law 503 and the underlying military curfew and evacuation orders. Instead, Petitioner argued and still argues that the fifth amendment "prohibits the discrimination made between citizens of Japanese descent and those of other ancestry." Hirabayashi, 320 U.S. at 89. In

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[2] In Agurs, the evidence concerned failure to disclose a victim's arrest record. The Court pointed out that this evidence had some marginal materiality, but since it did not actually contradict any evidence of the prosecutor and was simply cumulative of other evidence in favor of the accused, it could not serve to raise doubts regarding the defendant's guilt. Agurs, 427 U.S. at 113-114. In contrast, Petitioner's case concerns Government concealment of obviously exculpatory

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RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

response to Petitioner's due process argument, the Government presented to the courts a "tailored" factual record to support its argument that military necessity justified the imposition of the military curfew and exclusion orders. The Petitioner argues that the Government attorneys and their agents suppressed exculpatory evidence that would have permitted the Petitioner to rebut the Government's arguments. Therefore, based upon the test set forth in Taylor, this court must now determine whether the omitted evidence seriously prejudices Petitioner, offends elementary standards of justice, or even absent prejudice, undermines public confidence in the administration of justice.

The Supreme Court in Hirabayashi made it clear that the Government's claim of military necessity, and therefore constitutionality of the military orders, rested upon the Government's claims regarding the disloyalty and disloyal acts of Japanese Americans. The Court framed the essential question in Hirabayashi as follows: "[w]hether in the light of all the facts and circumstances there was any substantial basis for the conclusion ... that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage." Hirabayashi, 320 U.S. at 95.

(footnote continued)

evidence, unknown to Petitioner, that directly bears on the constitutionality of the statute and military orders under which Petitioner was convicted, and is not cumulative.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

As evidenced by the Court's opinion in Hirabayashi, the Government's allegations of Japanese American espionage and sabotage were material to the Supreme Court's decision. In Hirabayashi, the Court stated:

> [We] cannot reject as unfounded the judgment of the military authorities and that of Congress that there were disloyal members of that [Japanese American] population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Id. at 99. The Court added,

> [T]he findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made....
>
> The military commander's appraisal of facts ..., and the inferences which he drew from those facts, involved the exercise of his informed judgement ... [T]hose facts ... support [his] judgment ..., that the danger of espionage and sabotage to our military resources was imminent....

Id. at 103-104.

The Court's decision on the constitutionality of the military orders, therefore, rested on the premise that wartime necessity existed to support the promulgation of military measures and that there was no other reasonable alternative. Evidence contradicting both contentions would clearly have been material to the Court's finding and its consequent judgments. Each of the documents suppressed refuted different aspects of the Government's case and, when viewed as a whole, the suppressed

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

(c) "The security of the Pacific Coast continues to require ... exclusion of the Japanese ... and will continue for the duration of the present war."

Officials of the War Department excised and altered these statements in the original Final Report because the statements stood in direct opposition to the Government's position that the reason for mass evacuation was insufficiency of time to hold individual hearings. In addition, the statements contradicted prior statements made by General DeWitt, thus impairing his credibility. The statements were excised and redrafted to state that "no ready means existed for determining the loyal and disloyal," which even in this revised form was a false or misleading statement. (Revised Final Report, p. 9.)

Ignorant of War Department's statements that insufficiency of time was not the reason for the military actions, the Justice Department continued to argue to the courts that the justification for the orders was, in fact, insufficiency of time. The Government stated in its brief to the United States Supreme Court in Hirabayashi: "it would be impossible quickly and accurately to distinguish those persons [who had formed an attachment to, and sympathy and enthusiasm for, Japan] from other citizens of Japanese ancestry." Brief for United States in Hirabayashi v. United States, p 12.

2. Suppression of the ONI and Munson Reports on Japanese American Loyalty. The ONI, pursuant to the "Delimitation Agreement," was assigned to investigate the West

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

evidence could have undermined the Government's position that any security threat by the Japanese American populace existed. A short examination of documents and their individual significance underscores this point.

1. Suppression of the Final Report. It was assumed until recently that only one version of the Final Report, dated June 5, 1943, was composed. However, a previously printed and circulated version containing statements contrary to positions the Government presented to the Supreme Court has been recently discovered. Certain statements made in the Final Report were excised or altered for the express purpose of avoiding an "unfavorable reaction" by the Supreme Court. Needless to say, the Supreme Court never received a copy of the Final Report, and all copies of the Report were recalled, and the galley proofs, galley pages, drafts, and memoranda relating to the original Final Report were destroyed by burning.

Among the statements in the Final Report which were altered or excised and suppressed were the following:

(a) "It was impossible to establish the identity of the loyal and disloyal with any degree of safety."

(b) "It was not that there was insufficient time in which to make such determination; it was simply a matter of facing the realities that a positive determination would not be made, that an exact separation of the 'sheep from the goats' was unfeasible." (Emphasis added).

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Coast Japanese American population. The ONI Report, prepared by Lt. Commander Ringle at the direction of the Chief of Naval Operations, concluded that the majority of Japanese Americans were loyal to the United States. Furthermore, the ONI Report stated that not only were Japanese Americans "Americanized," but that the disloyal could be identified and a mechanism for distinguishing between the loyal and disloyal could have been established. Indeed, other authorities, such as the FBI, recognized that the Japanese Americans presented no grave threat to this country's security.

The ONI Report was sent to Attorney General Francis Biddle in 1942 and was known to the Government throughout the trial and appeal of Petitioner's case. Yet this report was never presented to either the courts or Petitioner. Given the assertions in the Government's Hirabayashi brief that the loyalty of Japanese Americans was questionable and that disloyal Japanese Americans could not readily be distinguished with any certainty, the ONI Report was material to any factual rebuttal by Petitioner.

3. Suppression of the MID, the FBI, and FCC Reports. The alleged potential for espionage and sabotage by Japanese Americans was central to the Government's argument justifying its curfew and exclusion orders. In both versions of the Final Report, DeWitt argued that the military orders were justified because Japanese Americans were predisposed to acts of espionage and sabotage. In support of his allegations, he cited the interception of unauthorized radio communications and reports of

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

unauthorized signal lights, implying that Japanese Americans were responsible for such acts.

Both the War Department and the Justice Department possessed evidence which flatly refuted these allegations before the Hirabayashi case was decided. This evidence was suppressed from the trial court and the United States Supreme Court. Official records of the MID, FBI, and FCC specifically rejected DeWitt's claim that Japanese Americans committed, or were prepared to commit, acts of espionage or sabotage. The chairman of the FCC, in fact, reported to the Attorney General that every shore-to-ship signal had been investigated and no substantiation of illicit signaling was ever discovered. General DeWitt was informed of this as early as January 9, 1942, yet stated in both versions of the Final Report that illicit radio communication had occurred with the implication of participation by Japanese Americans.

As discussed above, the suppressed evidence is highly material and sufficient to establish doubt as to whether the finding of constitutionality would have been made had the evidence been before the Court. Far from being harmless or marginally relevant, the suppressed evidence seriously prejudiced Petitioner's case. The evidence is material under the Mooney and Agurs standards of materiality for false and suppressed evidence. The coram nobis standard set forth in Taylor is fully met.

The above-described documents contained facts which contradicted Government assertions of "military necessity" and

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

thus each was of "obviously exculpatory character", Agurs, 427 U.S. at 107.[3] Additionally, the records of the MID, FBI, and FCC, would have further undercut the credibility of General DeWitt as a source of accurate factual information concerning the threat posed by the Japanese Americans. Without contrary evidence, however, the courts in general and the Supreme Court in particular were left with a biased, fabricated record. The frustration over the inadequacies of the record was expressed by Justice Jackson in his dissent in Korematsu,

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.

323 U.S. at 245.

C. The Use of Evidence Which The Prosecutor Knew or Should Have Known to be False, and the Failure To Correct or Disclose Such Falsity Violated Petitioner's Due Process Rights To a Fair Proceeding.

The submission of false evidence by the Justice Department falls within the first category of suppression cases defined by Mooney. The Government presented the courts with false "evidence" suggesting that Japanese Americans engaged in acts of espionage and sabotage. This "evidence" was contradicted by

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[3] Even if this court considers the suppressed information merely the opinions of military officials, it has been held that

(cont. next page)

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

information in the possession of the Government. The Court, unaware of the falsity of these allegations, relied on these "facts" to uphold the constitutionality of the curfew and exclusion orders.

The following summarizes the false evidence submitted:

1. The Government asserted that the military orders were necessary because there was insufficient time to separate the loyal from the disloyal. This contention was contradicted by statements in the original Final Report which were withheld and later excised and altered to conceal evidence from the Court.

2. The Government asserted that the racial characteristics of Japanese Americans predisposed them to disloyalty.

3. The Government's argument that the concentration of Japanese near vital West Coast war industries implied fifth column activities.

Unquestionably, the Government's pervasive misconduct "so pollute[d] [the] criminal proceeding as to require a new trial." Taylor, 648 F.2d at 571. The Government's knowing use of false evidence raises to the level of constitutional error rendering the proceeding irregular and invalid. Morgan, 346 U.S. at 502.

(footnote continued)

due process is violated when the prosecution fails to inform the defense that contrary opinion exist. Ashley v. Texas, 319 F.2d 80, 85 (5th Cir. 1963), cert. denied, 375 U.S. 931 (1963).

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

It is established law that a conviction of a defendant based on false evidence is "inconsistent with the rudimentary demands of justice." Mooney, 294 U.S. at 112. Following Mooney, courts have consistently held that the prosecutor's knowing use of false evidence is unconstitutional. Pyle v. Kansas, 317 U.S. 213 (1942); Hysler v. Florida, 315 U.S. 411 (1942); Giglio v. United States, 405 U.S. 150 (1972). It is not only improper for the prosecution to affirmatively misrepresent facts, but it is just as improper for the prosecution to create an inference of guilt by omitting material facts. As stated in Imbler v. Craven, 298 F. Supp. 795, 806 (C.D. Cal. 1969), aff'd sub nom. Imbler v. California, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970):

> ... omissions and half-truths are equally damaging and prohibited, and their use is no less culpable. Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony.
>
> "Evidence may be false either because it is perjured, or, though not in itself factually inaccurate, because it creates a false impression of facts which are known not to be true." [Citations omitted.]

[Emphasis added.]

In Petitioner's case, the central issue before the Court was whether the Public Law 503 and the underlying military orders were constitutional. To support its argument of military necessity, the Government used the false evidence described herein to paint a false and misleading picture of imminent threat to the security of the West Coast. Whether by affirmative

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

misrepresentation, suggestive inference, or by failure to disclose contrary evidence, the Government knowingly and purposefully made a false impression on the courts.

III. DUTY TO DISCLOSE EXCULPATORY EVIDENCE EXTENDS TO INVESTIGATIVE AGENCIES.

It is well established that the duty to disclose exculpatory evidence extends not only to prosecuting attorneys, but to the entire Government, including investigative agencies. United States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1975), cert. denied 423 U.S. 1087 (1976); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

In Bryant, the court remanded the case for a determination of the Government's degree of negligence or bad faith in connection with the loss of a tape recording between the defendants and undercover agents of the Bureau of Narcotics and Dangerous Drugs ("BNDD"). The defense attorneys were consistently told by the attorneys for the Government that no tapes of conversations existed. A few days prior to the trial the Government attorneys informed the defendants' attorneys that there had been a tape, but that the BNDD had lost it. Subsequent testimony showed that the tape had been intentionally not preserved and that the U.S. Attorneys Office was not informed of the tape's existence. In stating the safeguards afforded defendants in requiring disclosure of certain evidence by the Government, the court stated:

> Technically, it may be that evidence which cannot be found is not in the Government's "possession," And, of

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

> course, that which the Government does not have it cannot disclose. But this line of reasoning is far too facile, and clearly self-defeating. The language of Brady, Rule 16 and the Jencks Act includes no reference to the timing of possession and suppression. It is most consistent with the purposes of those safeguards to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Bryant, 439 F.2d at 650-651.

Even assuming the Justice Department was unaware of the existence of the two versions of the Final Report, and the different intelligence reports that contradicted the findings of the two versions of the Final Report, the War Department had its own duty to disclose the exculpatory evidence. At that time, the War Department was acting as an investigative agency for the Justice Department.

IV. GOVERNMENT ATTORNEYS ARE IMPUTED WITH KNOWLEDGE OF WAR DEPARTMENT AND OTHER INVESTIGATIVE AGENCIES.

Courts have consistently held that the nondisclosure by those involved with the prosecution of an individual may be imputed to the prosecutor. In United States v. Butler, 567 F.2d 885 (9th Cir. 1978), newly discovered evidence indicated that agents had told a government witness that dismissal or at least reduction of the charges pending against him was a strong possibility if he testified against the defendant. Despite the lack of knowledge by the prosecuting attorney of these promises, the court ordered a new trial and held:

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

> [E]ven if the prosecutor's conduct could be explained by a lack of knowledge of promises made to his principal witness, he would still be responsible for the consequences of his nondisclosure.

The Supreme Court said in Giglio v. U.S., 405 U.S. 150, 154:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government ... to the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to ensure communication of all relevant information on each case to every lawyer who deals with it.

Butler, 567 F.2d at 889.

In Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), cert. denied 444 U.S. 1013 (1980), the court held that a police detective's knowing concealment of a witness amounted to the state's suppression of evidence favorable to the petitioner, which deprived him of due process. The lower court had found that the motivation for the concealment was personal and not an official attempt to prejudice the case against the petitioner and in any event lacked any possible material prejudicial affect. In rejecting this finding, the Court of Appeals held:

> We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and otherwise proper conduct of the state attorney, the policeman's conduct must by imputed to the state as part of the prosecution team. [Citations omitted.]

Id. at 69.

In the leading case of Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), the court ruled that the defendant was entitled to have his conviction set aside

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

because the prosecutor failed to disclose potentially exculpatory evidence which was withheld by the police. The court held that even though the police, rather than the prosecutor, withheld the information, the resulting denial of due process was the same:

> ... the effect of the nondisclosure [is not] neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes not difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Id. at 846.

The court emphasized that the State's duty to assure the fairness of the proceedings and to achieve justice extends beyond the prosecuting attorneys to the enforcement agency of the state itself:

> The duty to disclose is that of the state which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. [Footnotes omitted].

Id. at 846.[4]

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[4] For reaffirmation of this basic principle, that any government misconduct is the responsibility of the prosecution, see Giglio, 405 U.S. at 154 (1972); Ray v. United States, 588 F.2d 601, 603 (8th Cir. 1978).

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

V. THE PROSECUTION'S BAD FAITH IN INTENTIONALLY ALTERING AND DESTROYING EVIDENCE MATERIAL TO PETITIONER'S DEFENSES VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

Several branches of Government collaborated to alter and destroy the original Final Report. This destruction not only constituted suppression of evidence, but also raises an independent ground of misconduct upon which this court may vacate the Petitioner's convictions.

When the prosecution and affiliated Government agencies are responsible for the loss or destruction of evidence, the courts will find a due process violation if bad faith lies behind the Government's actions. This standard should be distinguished from the standard applicable to suppression cases discussed above. In suppression cases, a due process violation will be found on the basis of the materiality of the evidence, "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

In 1974, the Ninth Circuit established an explicit test for vacation of convictions based on destruction of evidence. In United States v. Heiden, 508 F.2d 898 (9th Cir. 1974), the court was confronted with destruction of marijuana prior to appellant's trial. The court declared that

> When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of evidence.

Id. at p.902.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Prior to Heiden, the courts had established that the loss or destruction of evidence by the prosecution could violate defendant's constitutional rights if the prosecutor acted in bad faith. See United States v. Augenblick, 393 U.S. 348 (1969); Bryant, 439 F.2d 642 (D.C. Cir. 1971); United States v. Henry, 487 F.2d 912 (9th Cir. 1973).

It is significant to note that after Heiden, the courts have suggested that prejudice will be presumed if there is intentional destruction of evidence by the prosecution. As stated in United States v. Arra, 630 F.2d 836, 849-850 (1st Cir. 1980), where the Government erased a tape of their surveillance of the appellants,

> It may be, though we do not now so decide that intentional wrongful misconduct on the part of the Government would warrant an assumption that the evidence destroyed would have been favorable to the defense.

In the instant case, the various Government and military authorities purposefully and methodically collected all copies of the original Final Report and had them destroyed. The conclusion is inescapable that the intent behind the destruction was to keep any evidence contrary to the Government's legal position away from the Court. This intent is underscored by Government agents' efforts to destroy not only the original Final Report, but to alter and cover up any records of its existence, even to the extent of redating transmittal letters. Such a blatant exhibition of bad faith falls squarely within the type of misconduct prohibited by Heiden.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

In addition, the destruction of the Final Report was prejudicial to Petitioner's defense. The Government's claim of military necessity rested on the assumption that there was insufficient time to determine the loyalty of Japanese Americans on an individual basis. Yet, General DeWitt's own statement that insufficiency of time was not the reason for the orders, were destroyed with the original Final Report. Petitioner was thereby prejudiced in his ability to challenge the factual justification for the military orders put forth by the Government. The bad faith exhibited by the War Department in altering and destroying the original Final Report was so egregious and calculated that the court should presume that the evidence destroyed favored Petitioner. Arra, 630 F.2d 836.

VI. THE GOVERNMENT OWES PETITIONER AND THE COURTS A CONTINUING DUTY TO DISCLOSE.

The Government's misconduct continued after Petitioner's trial and appeal. In the later Korematsu case, the Government continued to mislead the Court regarding the evidence used to justify its treatment of Japanese Americans. Such conduct included suppression of exculpatory evidence refuting allegations of espionage and sabotage (Petition, pp. 34-61); failure to advise the court of evidence presented which it knew to be false (Petition, pp. 62-69); manipulation of the amicus briefs to knowingly present false evidence (Petition, pp. 62-69). The Government's duty to disclose exculpatory evidence continues after trial and conviction. United States v. Sheehan, 442 F.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Supp. 1003 (D. Mass. 1977), aff'd 542 F.2d 1163 (1st Cir. 1976). As stated by the Supreme Court in Imbler v. Pachtman, 424 U.S. 409, 427, n.25 (1976), the prosecutor's duty is

> ... to bring to the attention of the court or proper officials all significant evidence suggestive of innocence or in mitigation. At trial this duty is enforced by the requirements of due process but after a conviction, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction.

The Government's duty towards Petitioner was not dispatched because its misconduct was successful in obtaining a conviction, but rather its duty has continued through the years to require disclosure of the truth.

VII. GOVERNMENT ABUSE OF JUDICIAL NOTICE AND MANIPULATION OF AMICUS BRIEFS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND CONSTITUTED A FRAUD ON THE COURTS.

The Government pressed the court to take judicial notice of certain racial characteristics of Japanese Americans that, the Government submitted, predisposed them to disloyalty. The Government took this position despite its possession of contrary evidence indicating that it was a subject of dispute and not appropriate for judicial notice. Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Colum. L. Rev. 175 (1945). The Government in effect gained a criminal conviction based upon racist characterizations it represented as not being subject to reasonable dispute.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

This urging of judicial notice was buttressed by manipulation of the amicus brief filed by the States of California, Washington and Oregon. The original Final Report contained arguments based upon alleged racial characteristics. Because parts of the original Final Report damaged the Government's case it was withheld from the Justice Department by the War Department. Nonetheless the War Department put the derogatory material before the court through lengthy excerpts in the amicus brief.

Through judicial notice and the amicus brief, the Government knowingly used false evidence of sabotage and discredited racial slurs to justify as militarily necessary the curfew, evacuation, and internment orders imposed upon all Japanese Americans solely on the basis of their race.

These Government acts constitute an abuse of both Petitioner and the judicial system. Due process protection is not limited to particular, familiar, fact situations. Taylor, 648 F.2d at 571. The right to due process is not vitiated simply because the Government devises a new way to abuse it. These abuses, combined with the suppression of evidence and destruction of documents by the Government, constitute a relentless pattern of abuse in violation of elementary standards of justice and require the coram nobis relief sought by Petitioner.

VIII. CONCURRENT SENTENCE DOCTRINE REJECTED.

The Respondent in its pleadings and in arguments before this Court has contended that although Petitioner was convicted of

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

violating both exclusion and curfew orders, this Court's coram nobis review should be limited to the curfew violation. The Government contends that because the Supreme Court, in using the Concurrent Sentence Doctrine, ruled only on the validity of the curfew order, this court should close its eyes to the violations perpetrated against Petitioner. The Government is thereby clearly attempting to avoid dealing with some of the crucial issues raised by the Petition.

The Ninth Circuit has recently reviewed this doctrine and rejected its further use altogether, stating:

> An additional reason counsels against maintenance of the doctrine in any form. Every federal criminal defendant has a statutory right to have his or her conviction reviewed by a court of appeals. 28 U.S.C. § 1291; Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962). The statutory right to appeal is deemed so important that a district court judge is required to inform a defendant specifically of that right after trial and sentencing ... that right encompasses all convictions. The concurrent sentence doctrine, by permitting an appellate court to decline to review a conviction for reasons of judicial economy, impinges upon the defendant's statutory right.

(Emphasis added.) United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir. 1984).

Where, as in the instant case, relief sought by Petitioner is based upon equitable grounds, to allow the Government to continue to hide behind procedure and not substance would be totally unjust. Particularly in a coram nobis setting, the court should look at all the facts to determine whether governmental misconduct violated the sanctity of the legal process.

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

Furthermore, the Petition requests vacation of both curfew and exclusion convictions. If the court reviews only the curfew violation, that would still leave the exclusion conviction on the Petitioner's record. Indeed, since the Supreme Court ruled only on the curfew violation, this Court is now free to more fully examine Petitioner's exclusion conviction.

IX. LACHES DEFENSE FAILS AS A MATTER OF LAW AND EQUITY.

The Government has urged that laches bars Petitioner's application for relief. In relying upon this defense, the Government bears the burden of establishing the dates the suppressed documents became available to Petitioner. Transcript of Proceedings before Honorable Donald S. Voorhees, May 18, 1984, pp. 104-105. In addition, Petitioner has exercised due diligence in bringing this action, especially in light of the Government's unclean hands and lack of any showing of prejudice. Moreover, as a matter of law, laches is not a proper defense to a proceeding brought to remedy a fraud on the court.

A. Petitioner Exercised Due Diligence.

In Morgan, the Supreme Court did not speak in terms of laches but required the petitioner only to show "sound reasons" for his inability to seek earlier relief. Petitioner has done so in this case.

First, certain of the most critical evidence in Petitioner's case, proving that the Government knowingly withheld material evidence from the courts, was not made known to the public until 1981-1982. Thus, Ennis' memorandum to Fahy of April 30, 1943

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

(Petition, Ex. Q) was only discovered after 1980 during the course of the work performed by the Commission on Wartime Relocation and Internment of Civilians. See, Hohri v. United States, 586 F. Supp. 769, 789 (D.D.C. 1984). Ennis' memorandum established that the Justice Department was aware of the significance of the ONI Report and, notwithstanding Ennis' concerns, knowingly withheld this evidence from the courts. Similarly, Ennis' and Burling's memoranda, memorializing the Government's continuing manipulation of the Final Report in its brief to the Supreme Court in Korematsu, were not discovered until 1981-1982. (Petition, Exs. AA and BB.)

Furthermore, evidence of the War Department's alteration and attempted destruction of the original version of the Final Report did not come to Petitioner's attention until 1981-1982. The technical availability of the original version of the Final Report and other relevant documents in the National Archives in the 1950s does not show that Petitioner had reasonable notice of or access to these documents. The discovery of the documents pertaining to Petitioner's case among the hundreds of thousands of documents in the National Archives was an arduous task, requiring substantially more than due diligence. Moreover, not all documents--particularly those of the FBI--are in the National Archives. Finally, the methods by which these documents are stored and retrieved make them realistically available only to those with special training in historical research. Given the extreme difficulties that even scholars have encountered in their

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

research, the court cannot reasonably conclude that a layperson could have been able to discover these documents in the exercise of due diligence.[5] Petitioner has unquestionably shown sound reasons for his inability to file the instant petition earlier.

B. The Government Has Failed To Show Prejudice.

The Government has also failed to establish that it has been prejudiced by Petitioner's alleged delay. Despite its repeated assertion that witnesses have died and memories of living witnesses have faded, the Government has not made any showing whatsoever as to what testimony these witnesses would have been able to give to negate the plain import of the evidence offered by Petitioner in this case. This failure is especially significant since the petition is principally based on the Government's own documents. For instance, the Government has not identified any witnesses who will testify or any evidence which indicates that the Final Report was not altered as charged or

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[5] The Government has itself repeatedly recognized the difficult burden of locating and reviewing the documents relevant to this action. As of May 17, 1985, the Government emphasized the "hundreds of attorney and staff hours [consumed] reviewing two hundred thousand pages of potentially relevant documents in order to provide Petitioner with copies of several thousand documents that may not have been previously available to him." (Emphasis added.) Government's Proposed Prehearing Order, pp. 9-10. Similarly, over two years ago, in the first status conference in Korematsu on March 14, 1983, while emphasizing the enormous mass of material addressed by the Commission in its research, Government counsel stated:

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RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

that it was not represented to be the definitive statement of the Government's position. Indeed, the Government's failure to name McCloy, Bendetsen, or Weschler as witnesses in this case--although these central actors are not only alive but have testified before various forums in recent years--only emphasizes the lack of merit in the Government's claim of prejudice.

C. The Government Is Estopped By Unclean Hands.

The Government's defense of laches invokes the equitable powers of this court. However, "he who comes into equity must come with clean hands." Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945). This is especially true where, as here, the case involves issues of substantial public importance:

> Where a suit in equity concerns the public as well as private interests ..., this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

Id. at 815.

The gravamen of the instant petition is a pervasive pattern of misconduct founded in the Government's suppression, alteration, and attempted destruction of evidence, together with

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(footnote continued)

> "I've been to the National Archives myself three times in the last three weeks and I was overwhelmed. They have literally a wall of documents." (Emphasis added.) (Transcript, 3/14/83, at 6-7.)

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

a knowing presentation of false evidence in order to obtain Petitioner's convictions. Having achieved this result, the Government cannot now invoke equity to prevent redress of that injustice. "The equitable powers of this court can never be exercised in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage." Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933).

D. The Defense Of Laches Is Inapplicable Because The Misconduct Constitutes A Fraud On The Court.

Finally, since Petitioner has made a prima facie showing that the Government engaged in misconduct constituting a fraud on the court, Taylor, 648 F.2d at 570-571, the defense of laches is entirely inapplicable to this case. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), overruled on other grounds, Standard Oil of California v. United States, 429 U.S. 17 (1976).

As the Supreme Court declared in Hazel-Atlas, wherein it rejected the contention that relief from a ten year old judgment obtained on the basis of fabricated evidence was barred by laches:

> "But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties.... It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

> so impotent that they must always be mute and helpless victims of deception and fraud."

Id. at 246; see also, Toscano v. C.I.R., 441 F.2d 930, 933-935 (9th Cir. 1971) (recognizing that lack of diligence is not a bar to relief for fraud on the court).

In sum, this case presents an injustice which is "sufficiently gross to demand a departure from rigid adherence" to procedural rules which might be applicable in other circumstances and which requires redress irrespective of the diligence of the parties. Hazel-Atlas, 322 U.S. at 244. "[W]here the occasion has demanded, where enforcement of the judgment is 'manifestly unconsionable,'" the courts will exercise their inherent equitable power "without hesitation." Id. at 244-245. As Justice Black proclaimed in Hazel-Atlas:

> "Equitable relief against fraudulent judgments is . . . a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule . . . . Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

Id. at 248.

The injustices clearly established by Petitioner's evidence require no less from this court. The Government's spurious claim that Petitioner is guilty of laches must be rejected.

CONCLUSION

The Government's misconduct in securing Petitioner's convictions and defending those convictions on appeal offends the

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

most fundamental notions of justice. Not only did the Government's misconduct seriously prejudice Petitioner and deny him the right to a fair trial, but the Government's misconduct also violated the sanctity of the courts and undermined the public's confidence in the administration of justice.

Through Petitioner's convictions, the Government won this Court's approval of military curfew and exclusion orders that applied to a group of individuals identified simply on the basis of ancestry. The Government now raises the doctrine of laches in an attempt to bar Petitioner's prayer for relief. This defense, however, should be rejected for several reasons, the most compelling of which is the Government's "unclean hands." Ironically, the Government seeks to invoke this Court's equitable powers to further conceal its misconduct and frustrate Petitioner's attempt to redress the injustice he has suffered for over forty years.

For these reasons, this Court should reject the Government's laches defense and grant the petition for writ of error coram nobis. By so doing, this Court will correct fundamental errors and prevent Petitioner from suffering further injustice.

DATED this 10th day of June, 1985.

Respectfully submitted,

By _____
Rodney L. Kawakami,
Attorney for Petitioner

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932